



OCT 14 2005

**TO:** Mark B. McClellan, M.D., Ph.D.  
Administrator  
Centers for Medicare & Medicaid Services

**FROM:** Daniel R. Levinson *Daniel R. Levinson*  
Inspector General

**SUBJECT:** Audit of New York State's Medicaid Upper Payment Limits for Non-State Government Inpatient Hospitals and Nursing Homes (A-02-03-01021)

Attached is an advance copy of our final report on New York State's upper payment limits (UPLs) for non-State government inpatient hospitals and nursing homes. We will issue this report to the New York Medicaid agency within 5 business days. Our audit was part of a multistate review of UPL calculations.

The UPL is an estimate of the amount that would be paid for Medicaid services under Medicare payment principles. In 2001, the Centers for Medicare & Medicaid Services (CMS) revised Medicaid's UPL regulations to require that States calculate a separate UPL for each of the following categories of providers: private facilities, State facilities, and non-State government facilities. The regulations also created transition periods in which eligible States were allowed to make payments up to the category-specific UPL plus an excess amount, which is calculated based on the portion of Medicaid payments that exceeded the UPL in the applicable base year. Federal funds are not available for State expenditures that exceed these limits. Under the terms of New York's CMS-approved State plan amendments, inpatient hospitals were eligible only for category-specific UPL payments, while nursing homes were eligible for both category-specific UPL payments and transition period excess payments.

Pursuant to section 1923 of the Social Security Act, States must consider UPL payments and other payments received on behalf of Medicaid and uninsured patients when calculating hospital-specific disproportionate share hospital (DSH) payment limits. Medicaid makes DSH payments to hospitals that serve disproportionate numbers of low-income patients with special needs.

Our objectives were to determine, for State fiscal year (SFY) 2003, whether New York:

- calculated the category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations and the approved State plan amendment and properly included UPL payments in the calculation of hospital-specific DSH limits and

- calculated the category-specific UPL and the transition period excess payment for non-State government nursing homes in accordance with Federal regulations and the approved State plan amendment.

New York calculated the SFY 2003 category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations (42 CFR § 447.272) and the approved State plan amendment and properly included UPL payments in the calculation of hospital-specific DSH limits. New York also calculated the SFY 2003 category-specific UPL for non-State government nursing homes in accordance with 42 CFR § 447.272 and the approved State plan amendment.

Contrary to 42 CFR § 447.272, however, New York based its SFY 2003 transition period excess payment on estimated, rather than actual, Medicaid payment data from the base year. As a result, we expanded our review to include transition period excess payments for SFYs 2004 and 2005. We determined that New York overstated its transition period excess payments for SFYs 2003 through 2005 by \$85 million (\$43.3 million Federal share).

We recommend that New York refund to the Federal Government \$43.3 million in overpayments to non-State government nursing homes for SFYs 2003, 2004, and 2005.

In their comments on our draft report, New York officials did not specifically address our recommendation or the State's use of estimated, rather than actual, Medicaid data in its calculation of the base-year transition period excess amount. However, the officials took exception to our calculation of the overpayment amount.

Our calculation of transition period excess payments complied with the revised UPL regulations, which clearly state that the calculation should be based on actual Medicaid payment data and estimated Medicare payment data. Consequently, we continue to recommend that New York refund the \$43.3 million in overpayments.

If you have any questions or comments about this report, please do not hesitate to call me, or your staff may contact George M. Reeb, Assistant Inspector General for the Centers for Medicare & Medicaid Audits, at (410) 786-7104 or James P. Edert, Regional Inspector General for Audit Services, Region II, at (212) 264-4620. Please refer to report number A-02-03-01021 in all correspondence.

Attachment



DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

Office of Audit Services

Region II

Jacob K. Javits Federal Building

New York, New York 10278

(212) 264-4620

OCT 19 2005

Report Number: A-02-03-01021

Antonia C. Novello, M.D., M.P.H.  
Commissioner  
New York State Department of Health  
Corning Tower Building, Room 1405  
Empire State Plaza  
Albany, New York 12237

Dear Dr. Novello:

Enclosed are two copies of the U.S. Department of Health and Human Services (HHS), Office of Inspector General (OIG) final report entitled "Audit of New York State's Medicaid Upper Payment Limits for Non-State Government Inpatient Hospitals and Nursing Homes." A copy of this report will be forwarded to the HHS action official named on the next page for review and any action deemed necessary.

The HHS action official will make final determination as to actions taken on all matters reported. We request that you respond to the HHS action official within 30 days. Your response should present any comments or additional information that you believe may have a bearing on the final determination.

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Please refer to report number A-02-03-01021 in all correspondence.

Sincerely yours,

*John W. Berbock*

*for* James P. Edert  
Regional Inspector General  
for Audit Services

Enclosures

**Direct Reply to HHS Action Official:**

Ms. Sue Kelly  
Associate Regional Administrator  
Division of Medicaid and Children's Health  
Centers for Medicare & Medicaid Services, Region II  
Department of Health and Human Services  
26 Federal Plaza, Room 3811  
New York, New York 10278

**Department of Health and Human Services**

**OFFICE OF  
INSPECTOR GENERAL**

**AUDIT OF NEW YORK STATE'S  
MEDICAID UPPER PAYMENT LIMITS  
FOR NON-STATE GOVERNMENT  
INPATIENT HOSPITALS  
AND NURSING HOMES**



**Daniel R. Levinson  
Inspector General**

**OCTOBER 2005  
A-02-03-01021**

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## **OAS FINDINGS AND OPINIONS**

The designation of financial or management practices as questionable or a recommendation for the disallowance of costs incurred or claimed, as well as other conclusions and recommendations in this report, represent the findings and opinions of the HHS/OIG/OAS. Authorized officials of the HHS divisions will make final determination on these matters.



## **EXECUTIVE SUMMARY**

### **BACKGROUND**

#### **Upper Payment Limits**

The upper payment limit (UPL) is an estimate of the amount that would be paid for Medicaid services under Medicare payment principles. In 2001, the Centers for Medicare & Medicaid Services (CMS) revised Medicaid's UPL regulations for hospitals and nursing facilities.

The revised regulations changed the manner in which States calculate the UPL for various categories of providers. Pursuant to the former rule, States were required to calculate a UPL for all facilities and another UPL for State-owned facilities. The revised regulations instead require States to calculate a separate UPL for each of the following categories of providers: private facilities, State facilities, and non-State government facilities. The regulations also created transition periods in which eligible States were allowed to make payments up to the category-specific UPL plus an excess amount, which is calculated based on the portion of Medicaid payments that exceeded the UPL in the applicable base year. Federal funds are not available for State expenditures that exceed these limits.

New York adopted the category-specific payment limits of the revised regulations in its CMS-approved State plan amendments. Under the terms of the amendments, inpatient hospitals in New York were eligible only for category-specific UPL payments, while nursing homes were eligible for both category-specific UPL payments and transition period excess payments.

#### **Disproportionate Share Hospital Payments**

Section 1923 of the Social Security Act requires States to make disproportionate share hospital (DSH) payments to hospitals that serve disproportionate numbers of low-income patients with special needs. Section 1923 prohibits these payments from exceeding the hospital-specific DSH limit, which is generally defined as the cost of uncompensated care. States must consider UPL payments and other payments received on behalf of Medicaid and uninsured patients when calculating hospital-specific DSH payment limits.

### **OBJECTIVES**

Our objectives were to determine, for State fiscal year (SFY) 2003, whether New York:

- calculated the category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations and the approved State plan amendment and properly included UPL payments in the calculation of hospital-specific DSH limits and



- calculated the category-specific UPL and the transition period excess payment for non-State government nursing homes in accordance with Federal regulations and the approved State plan amendment.

## **SUMMARY OF FINDINGS**

New York calculated the SFY 2003 category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations and the approved State plan amendment. The UPL payments, totaling \$677.7 million (\$338.9 million Federal share), were properly included in the calculation of hospital-specific DSH limits. New York also calculated the SFY 2003 category-specific UPL for non-State government nursing homes, totaling \$141 million (\$70.5 million Federal share), in accordance with Federal regulations and the approved State plan amendment.

Contrary to Federal regulations, however, New York based its SFY 2003 transition period excess payment, totaling \$674.3 million (\$337.2 million Federal share), on estimated, rather than actual, Medicaid payment data from the base year. As a result, we expanded our review to include the SFYs 2004 and 2005 transition period excess payments totaling \$449.6 million (\$238.1 million Federal share) and \$224.8 million (\$112.4 million Federal share), respectively. We determined that New York overstated its transition period excess payments for SFYs 2003 through 2005 by \$85 million (\$43.3 million Federal share).

## **RECOMMENDATION**

We recommend that New York refund to the Federal Government \$43.3 million in overpayments to non-State government nursing homes for SFYs 2003, 2004, and 2005.

## **NEW YORK'S COMMENTS**

In their comments on our draft report, New York officials did not specifically address our recommendation or the State's use of estimated, rather than actual, Medicaid data in its calculation of the base-year transition period excess amount. However, the officials took exception to our calculation of the overpayment amount. The full text of New York's comments is included as an appendix to this report.

## **OFFICE OF INSPECTOR GENERAL'S RESPONSE**

Our calculation of transition period excess payments complied with the revised UPL regulations, which clearly state that the calculation should be based on actual Medicaid payment data and estimated Medicare payment data. Consequently, we continue to recommend that New York refund the \$43.3 million in overpayments.

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## **INTRODUCTION**

### **BACKGROUND**

Our audit was part of a multistate review of upper-payment-limit (UPL) calculations conducted at the request of the Centers for Medicare & Medicaid Services (CMS).

#### **Medicaid Program**

Title XIX of the Social Security Act (the Act) authorizes Federal grants to States for Medicaid programs that provide medical assistance to needy persons. Each State Medicaid program is jointly financed by the Federal and State Governments and administered by the State in accordance with a State plan approved by CMS. While the State has considerable flexibility in designing its plan and operating its Medicaid program, it must comply with Federal requirements. The Federal Government pays its share of Medicaid expenditures to a State according to a formula shown in section 1905(b) of the Act.

In New York, the Department of Health is responsible for administering the Medicaid program. Within the Federal Government, CMS administers the program.

#### **Upper Payment Limits**

State Medicaid programs have flexibility in determining payment rates for Medicaid providers. CMS has allowed States to pay hospitals and nursing facilities at different rates as long as the payments, in total, do not exceed the UPL.<sup>1</sup> The UPL is an estimate of the amount that would be paid for Medicaid services under Medicare payment principles.

To limit abuses in the application of UPL requirements, CMS revised its regulations (42 CFR § 447.272) in 2001. The revised regulations require States to calculate a separate UPL for each category of provider.<sup>2</sup> The regulations also created transition periods in which eligible States were allowed to make payments up to the category-specific UPL plus an excess amount, which is calculated based on the portion of Medicaid payments that exceeded the UPL in the applicable base year. Although payments to nursing homes under New York's State plan amendment 99-32 qualified for a transition period, payments to hospitals under State plan amendment 01-36 did not.

#### **Disproportionate Share Hospital Program**

Section 1923 of the Act requires States to make disproportionate share hospital (DSH) payments to hospitals that serve disproportionate numbers of low-income patients with

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<sup>1</sup>For non-State government hospitals, Federal regulations allowed Medicaid payments up to 150 percent of the UPL from March 13, 2001, to May 14, 2002.

<sup>2</sup>The three categories are privately owned and operated, State government owned or operated, and non-State government owned or operated facilities.

special needs. Section 1923 prohibits these payments from exceeding the hospital-specific DSH limit, generally considered as the amount of incurred uncompensated care costs. Uncompensated care costs are the costs of medical services provided to Medicaid and uninsured patients, less payments received for those patients. States must consider UPL payments and other payments received on behalf of Medicaid and uninsured patients when calculating hospital-specific DSH payment limits.

## **OBJECTIVES, SCOPE, AND METHODOLOGY**

### **Objectives**

Our objectives were to determine, for State fiscal year (SFY) 2003, whether New York:

- calculated the category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations and the approved State plan amendment and properly included UPL payments in the calculation of hospital-specific DSH limits and
- calculated the category-specific UPL and the transition period excess payment for non-State government nursing homes in accordance with Federal regulations and the approved State plan amendment.

### **Scope**

Our audit covered the \$677.7 million (\$338.9 million Federal share) in SFY 2003 category-specific UPL payments to non-State government inpatient hospitals under State plan amendment 01-36 and the \$815.3 million (\$407.7 million Federal share) in SFY 2003 category-specific and transition period excess payments to non-State government nursing homes under amendment 99-32.<sup>3</sup>

Based on our audit of transition period excess payments to non-State government nursing homes for SFY 2003, we expanded our review to include those payments for SFYs 2004 and 2005. The SFY 2004 payments totaled \$449.6 million (\$238.1 million Federal share), and the SFY 2005 payments totaled \$224.8 million (\$112.4 million Federal share). Further, we reviewed the State's calculation of the UPL in SFY 2000, the base year used to calculate the excess amount for the transition period.

We did not review the overall internal control structure of the State Department of Health because we accomplished the objectives of our audit through substantive testing. However, we documented pertinent controls related to the calculation of UPL payments and hospital-specific DSH limits.

We performed fieldwork at the State Department of Health in Albany, NY.

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<sup>3</sup>The nursing home payments consisted of a category-specific UPL amount of \$141 million (\$70.5 million Federal share) and a transition period excess amount of \$674.3 million (\$337.2 million Federal share).

## **Methodology**

To accomplish our objectives, we:

- reviewed Federal laws and regulations pertaining to UPLs and DSH payments,
- compared Federal regulatory requirements with the methodology for calculating UPLs established in State plan amendment 01-36 for non-State government inpatient hospitals and amendment 99-32 for non-State government nursing homes,
- examined directories of inpatient hospitals and nursing homes to verify that the State included only non-State government facilities in the UPL calculations,
- tested the underlying Medicaid and Medicare data for one hospital and one nursing home to gain an understanding of the methodology that New York used to calculate inpatient hospital and nursing home UPLs,
- traced the UPL payments calculated pursuant to State plan amendments 01-36 and 99-32 to the CMS-64 quarterly expenditure reports to determine whether the State claimed the payments for Federal reimbursement,
- reviewed New York's supporting records to verify that the State included UPL payments in the calculation of hospital-specific DSH limits, and
- traced DSH payments per New York's records to the CMS-64 quarterly expenditure reports to determine whether the State claimed the payments for Federal reimbursement and whether the payments were within the calculated DSH limits.

We performed our audit in accordance with generally accepted government auditing standards.

## **FINDINGS AND RECOMMENDATION**

New York calculated the SFY 2003 category-specific UPL for non-State government inpatient hospitals in accordance with Federal regulations and the approved State plan amendment. The UPL payments, totaling \$677.7 million (\$338.9 million Federal share), were properly included in the calculation of hospital-specific DSH limits. New York also calculated the SFY 2003 category-specific UPL for non-State government nursing homes, totaling \$141 million (\$70.5 million Federal share), in accordance with Federal regulations and the approved State plan amendment.

Contrary to Federal regulations, however, New York based its SFY 2003 transition period excess payment on estimated, rather than actual, payment data from the base year. As a result, we expanded our review to include transition period excess payments for SFYs 2004

and 2005. We determined that New York overstated its transition period excess payments for SFYs 2003 through 2005 by \$85 million (\$43.3 million Federal share).

## **FEDERAL AND STATE REQUIREMENTS FOR NURSING HOMES**

Effective March 13, 2001, revised Federal regulations required States to calculate a separate UPL for each provider category (42 CFR § 447.272). The Medicare, Medicaid, and State Children's Health Insurance Program Benefits Improvement and Protection Act of 2000 provided transition periods for eligible States. These transition periods provided a phase-in of the new category-specific UPLs based on the timing of State plan amendments. New York's UPL program for inpatient hospitals did not qualify for a transition period. New York's UPL program for nursing homes qualified for a 5-year transition period beginning on March 13, 2001, and ending on March 31, 2006.

During the 5-year transition period, New York's Medicaid payments to nursing homes were limited to the category-specific UPL amount plus an excess amount, which is calculated based on the portion of Medicaid payments that exceeded the UPL, as defined under the current regulation, in SFY 2000 (the applicable base year). Pursuant to the revised regulations, New York's UPL payments should be limited as follows:

- For SFY 2002, the UPL consisted of the category-specific UPL plus the transition period excess amount.
- For SFYs 2003 through 2006, the UPL for each year consisted of the category-specific UPL plus the transition period excess amount, reduced in 25-percent increments each year starting in SFY 2003.

Federal funds are not available for Medicaid payments that exceed these limits (42 CFR § 447.257).<sup>4</sup> New York adopted the category-specific payment limits of 42 CFR § 447.272 in State plan amendment 99-32.

Regulations (42 CFR § 447.272(e)(iii)) require States to use payments in the base year to calculate the transition period excess amount. CMS reiterated this requirement in a February 20, 2002, letter to New York by stating: "The 'excess' . . . represents the payment amounts to long-term care services paid in SFY 2000 that exceed the maximum amount that could have been paid under the UPL described in the revised regulations at 447.272(b) had it been applied to SFY 2000."

## **UPPER-PAYMENT-LIMIT CALCULATIONS FOR NON-STATE GOVERNMENT NURSING HOMES**

During SFY 2003, New York appropriately calculated the category-specific UPL amount, but not the transition period excess amount. Contrary to Federal regulations, New York

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<sup>4</sup>After the transition period ends, the category-specific UPLs will serve as the maximums for State expenditures that qualify for Federal matching.

based the transition period excess amount on estimated, rather than actual, aggregate Medicaid payments to non-State government nursing homes during the base year (SFY 2000).

Historically, New York used estimated data to calculate UPLs for non-State government nursing homes because the State made UPL payments at the beginning of each fiscal year, when estimated data were the best data available. New York continued to follow this practice, even though actual payment data were available, when it calculated the SFY 2000 base-year transition period excess amount. The base-year transition period excess amount that the State calculated totaled \$899.1 million. Our calculation, using actual payment information, amounted to \$842.5 million.

To compute the transition period excess payments for the years covered by our audit, we applied the provisions of Federal regulations to our \$842.5 million base-year calculation. The table below compares our calculation with that of New York and shows the State's resulting overstatements.

**Calculation of Transition Period Excess Payments for  
Non-State Government Nursing Facilities  
(Dollars in Millions)**

SFY	Allowable Part of Base-Year Excess	State Calculation	Office of Inspector General Calculation	Overstatement	
				Total	Federal Share <sup>5</sup>
2003	75% of Excess	\$899.1 x 75% = \$674.3	\$842.5 x 75% = \$631.8	\$42.5	\$21.2
2004	50% of Excess	\$899.1 x 50% = \$449.6	\$842.5 x 50% = \$421.3	28.3	15.0
2005	25% of Excess	\$899.1 x 25% = \$224.8	\$842.5 x 25% = \$210.6	<u>14.2</u>	<u>7.1</u>
<b>Total Overstatement Claimed</b>				<b><u>\$85.0</u></b>	<b><u>\$43.3</u></b>

The transition period excess payments that the State calculated and claimed for Federal reimbursement were overstated by a total of \$85 million (\$43.3 million Federal share) for SFYs 2003, 2004, and 2005.

<sup>5</sup>For SFYs 2003 and 2005, the Federal share was 50 percent. For SFY 2004, the Federal share was 52.95 percent pursuant to 42 CFR § 433.10.

## **RECOMMENDATION**

We recommend that New York refund to the Federal Government \$43.3 million in overpayments to non-State government nursing homes for SFYs 2003, 2004, and 2005.

## **NEW YORK'S COMMENTS**

In their comments on our draft report, New York officials did not specifically address our recommendation or the State's use of estimated, rather than actual, Medicaid data in its calculation of the base-year transition period excess amount. However, the officials asserted that our overpayment calculation did not consistently treat the Net Available Monthly Income (NAMI), which residents pay to nursing homes from Social Security, pensions, and other sources.

Specifically, State officials noted that our calculation included the NAMI as an offset to actual Medicaid payments but not to the estimate of what Medicare would have paid. The State said that our calculation reflected an "apples to oranges" comparison that was neither reasonable nor in accordance with the intent of the UPL regulations. According to State officials, CMS intended for States to use a consistent methodology when calculating what Medicaid and Medicare would pay for similar services. They asserted that, to be consistent, any offsets to actual Medicaid payments should also be applied when calculating the estimate of what Medicare would pay.

The State did not quantify the impact of consistent treatment of the NAMI on our recommended refund of transition period excess payments. State officials said that they had requested clarification of this issue from CMS but had received no response to date.

The full text of New York's comments is included as an appendix to this report.

## **OFFICE OF INSPECTOR GENERAL'S RESPONSE**

We do not agree that the calculation of transition period excess payments should include a NAMI offset to the estimate of what Medicare would pay. CMS allowed the one-time calculation of the base-year excess amount to provide States the opportunity to adjust to the revised UPL regulations. The regulations clearly state that the calculation should be based on actual Medicaid payment data and estimated Medicare payment data. Actual Medicaid payments to nursing homes do not include the NAMI that residents pay to the facilities. Further, the regulations make no provision for including the NAMI offset to what Medicare would pay. Consequently, we continue to recommend that New York refund the \$43.3 million in overpayments.



# **APPENDIX**



STATE OF NEW YORK  
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr.P.H.  
*Commissioner*

Dennis P. Whalen  
*Executive Deputy Commissioner*

April 1, 2005

Mr. Timothy J. Horgan  
Regional Inspector General for Audit Services  
U.S. Department of Health and Human Services  
Office of Inspector General  
Office of Audit Services  
Region II  
Jacob K Javits Federal Building  
26 Federal Plaza  
New York, NY 10278

Report Number: A-02-03-01021

Dear Mr. Horgan:

Enclosed are the Department of Health's comments on the DHHS - OIG's Draft Audit (A-02-03-01021) entitled "Medicaid Upper Payment Limits for Non-State Government Inpatient Hospitals and Nursing Homes".

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Whalen".

Dennis P. Whalen  
Executive Deputy Commissioner

Enclosure

cc: Mr. Cullen  
Ms. Gill  
Mr. Griffin  
Ms. Kuhmerker  
Mr. Howe  
Mr. Mossman  
Mr. Pellegrini  
Mr. Reed  
Mr. Van Guysling  
Mr. Van Slyke

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**Department of Health  
Comments on the  
Department of Health and Human Services  
Office of Inspector General  
Draft Audit Report A-02-03-01021 Entitled  
"Medicaid Upper Payment Limits for Non-State Government  
Inpatient Hospitals and Nursing Homes"**

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The following are the Department of Health's (DOH) comments in response to the Department of Health and Human Services (DHHS), Office of Inspector General (OIG) draft audit report (A-02-03-01021) entitled "Medicaid Upper Payment Limits for Non-State Government Inpatient Hospitals and Nursing Homes".

**DHHS RECOMMENDATION:**

Refund to the Federal Government \$43.3 Million in overpayments to non-State government nursing homes for SFYs 2003, 2004 and 2005.

**DOH RESPONSE:**

**BACKGROUND:**

The Centers for Medicare and Medicaid Services (CMS) require States to perform upper payment limit (UPL) calculations to assure Medicaid reimbursement methodologies for specified types of providers do not cost more in aggregate than can reasonably be estimated would be paid for the same services under Medicare payment principles.

Prior to March 13, 2001, federal regulations required States to calculate a UPL for all facilities within various provider classes (e.g. inpatient hospital, outpatient hospital, nursing facility services) and a separate UPL for payments made to state-operated facilities. The State's UPL calculations for nursing homes showed that New York's Medicaid reimbursement was substantially lower than what would have been the case for the same services under Medicare principles. Consequently, beginning in the mid 1990s, the State enacted supplemental payments to non-state government owned or operated nursing homes.

Effective March 13, 2001, federal regulations were revised to require States to separately calculate UPLs for each of three groups within each class of providers: State government-owned or operated facilities; non-state government-owned or operated facilities and privately-owned and operated facilities. CMS recognized this new requirement would severely reduce some States' Medicaid payments to non-state government owned or operated facilities and addressed this issue by including transition provisions in regulation that allowed certain States to make "excess" payments to such facilities, for varying periods of time depending on the State. For New York, the transition provisions allow payments to non-state government owned or operated nursing homes for state fiscal year

(SFY) 2002/03, SFY 2003/04 and SFY 2004/05 in the amount of 75%, 50% and 25% respectively, of the excess payment amount.

The enacted regulation defines the "excess" amount that is subject to phase-out to be: "...payments to a specific group of providers...in State FY 2000 that exceeded the amount that would have been under the upper payment limit described in paragraph (b) of this section if that limit had been applied to that year." The paragraph (b) citation refers to the new groupings (state, non-state, private). Further, when the proposed regulation was noticed in the Federal Register dated October 10, 2000, CMS provided a "Table – Illustrative Example of Transition Other Government-Owned or Operated Nursing Home Providers", the second footnote to which stated "The \$200 million excess payment is derived by subtracting the new aggregate UPL for State FY 2000 services provided by other government-owned or operated providers from the actual FY 2000 payment made to these providers".

#### **ISSUE 1 – THE "EXCESS" CALCULATION**

The first issue deals with the appropriate treatment of the Net Available Monthly Income (NAMI) in the State's calculation of the excess payment amount subject to transition for non-state government owned or operated nursing homes. The NAMI is the amount of income to be applied to the cost of care from income received by nursing home residents from social security, pensions and other sources. The NAMI is deducted each month by the State from the Medicaid amount that would otherwise be paid to nursing homes. This monthly patient cost sharing obligation is, effectively, the manner in which the State implements Medicaid spend-down for residents of nursing homes.

The draft audit report and overpayment calculations take the position that the State's calculation of the excess payment amount for non-state government owned or operated nursing homes should reflect the NAMI offset to Medicaid payments but should not include the offset in its estimate of what could have been paid under Medicare principles. For the reasons stated below, the State does not concur with this position.

- Federal regulations require UPLs to reflect, "a reasonable estimate of the amount that would be paid for the services furnished by the group of facilities under Medicare payment principles in subchapter B of this chapter". Two key elements of this regulation are that the limits must reflect **reasonable estimates** and **similar services**. We believe any excess payment calculation that reflects the NAMI offset in the actual Medicaid expenditures but not in the estimate of what could be paid by Medicare would be an "apples to oranges" comparison that is neither reasonable nor reflective of the intent of the "similar services" language.
- The State believes the following narrative CMS included in its "Analysis of and Response to Public Comment" when it issued the final UPL regulation supports its position:

Comment: Commenters recommended that States should also have the flexibility to continue to reach a reasonable estimate based on the Medicare

payment principles that reasonably relate to similar Medicaid services provided under comparable circumstances.

Response: The UPL requires States to make a reasonable estimate based on Medicare payment principles. There are many factors and elements that States may consider to support their estimates. Using Medicare payment principles for services similar to Medicaid service is a permissible approach.

The similar services language has always been interpreted broadly to require an “apples to apples” comparison of Medicaid and Medicare. For instance, the State believes it is federal policy that the reasonable estimate of what Medicare would pay for nursing home care should include adjustments to assure a like comparison of covered services and the actual patient acuity and utilization of the State’s Medicaid eligible nursing home population. We believe this principle carries over to issues of resident cost sharing and Medicaid eligibility, which are inherent in the NAMI issue.

- If the NAMI offset were not included in the Medicare estimate, the State would be effectively building in an assumption that Medicare would make payments that are duplicative of patient cost sharing amounts, though Medicaid did not make such payments. Or, viewing the NAMI as linked to Medicaid spend-down, it could be said that the lack of such an offset on the Medicare side of the equation would effectively build in an assumption that Medicare would provide payments for periods of recipient ineligibility. Obviously, the State believes such assumptions would be inappropriate.

## **ISSUE 2 – UPL CALCULATIONS GENERALLY**

The second issue is the appropriate treatment of the NAMI in the State’s calculation of nursing home UPLs generally, separate from the excess payment transition provisions. The State calculates nursing home UPLs by comparing the most recent Medicaid rates to what is estimated such rates would be if they were established using Medicare principles. The State has never reduced actual Medicaid rates or estimated Medicare rates to reflect the NAMI offset.

The State takes the position that UPL calculations should continue to reflect a rate-to-rate analysis (adjusted for case-mix, etc.) that either does or does not reflect the NAMI offset on both sides of the equation. We defer to CMS on whether the UPL should or should not reflect the NAMI offset on both sides of the equation.

However, if the final position is that the excess payment calculation must reflect the apples and oranges approach described above, the State asserts that such an approach (a NAMI offset to the Medicaid rates but not the Medicare rates) should be followed for all UPL calculations. This approach would provide substantial additional supplemental payments to non-state government owned or operated nursing homes than what the State has assumed to date. CMS has been unresponsive to the State’s request for clarification on these issues to date.

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